## UNITED STATES DISTRICT COURT

## DISTRICT OF MAINE

SHARI J. EDWARDS,	)	
	)	
Plaintiff	)	
	)	
v.	)	Docket No. 01-14-P-DMC
	)	
DAVID L. NIXON, et al.,	)	
	)	
Defendants	)	

## MEMORANDUM DECISION ON DEFENDANTS' MOTION TO DISMISS

The defendants, David L. Nixon and James E. Michalik, move to dismiss this action alleging legal malpractice for lack of subject-matter jurisdiction. I grant the motion.

An action may be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) when the court lacks jurisdiction over the subject matter of the action. It is the plaintiff's burden to prove the existence of subject-matter jurisdiction. *Aversa v. United States*, 99 F.3d 1200, 1209 (1st Cir. 1996).

In ruling on a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the district court must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff.

*Id.* at 1209-10 (citation omitted). When the jurisdictional facts are disputed by a defendant, materials of evidentiary quality outside the pleadings may be offered to and considered by the court. *Valentin v. Hospital Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001).

The *pro se* complaint alleges that the plaintiff is the mother, conservator and guardian of Aaron W. Brown and that the defendants committed legal malpractice in the course of representing Brown. Complaint (Docket No. 1). The complaint seeks recovery of fees paid to the defendants and other

damages, *id*. at 2, and invokes this court's diversity jurisdiction, alleging that the plaintiff is a resident of Maine while the defendants are residents of New Hampshire, *id*. at 3.

The only possible basis for this court to exercise jurisdiction over these state-law claims is provided by 28 U.S.C. § 1332(a), which provides such jurisdiction when the matter in controversy exceeds \$75,000 and is between citizens of different states. The defendants contend that this diversity jurisdiction is not present in this case because the plaintiff brings claims only in a representative capacity on behalf of her incompetent son, who is a resident of New Hampshire, as the complaint alleges the defendants are as well. Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, etc. ("Motion") (Docket No. 7) at 2-3. A subsequent section of the diversity jurisdiction statute provides:

For the purposes of this section . . . —

(2) the legal representative of . . . an infant or incompetent shall deemed to be a citizen only of the same State as the infant or incompetent.

28 U.S.C. § 1332(c)(2). The plaintiff responds that she is the "sole plaintiff" in this action and "only legally represent[s]" herself. Plaintiffs [sic] Respo[n]se to Defendants [sic] Motion to Dismiss for Lack of Subject Matter Jurisdiction, etc. (Docket No. 8) at 1. However, she also states that she is "a legal representative of Aaron W. Brown's person, but I am also Aaron W. Brown in the eyes of the law, stand in the shoes of." *Id.* at 2.

The plaintiff's second observation is correct. Her complaint cannot be fairly read to assert any claims other than those that could only be raised by Aaron W. Brown himself, were he legally competent to do so. Because she raises only Brown's claims, the plaintiff brings this action only as his legal representative, and section 1332(c) accordingly requires that she be deemed a citizen of the same state as Brown for purposes of diversity jurisdiction. The defendants have attached to their motion copies of certain pages of the deposition of the plaintiff in which she testifies that Brown

resides in New Hampshire and has done so since some time in 1999. Deposition of Shari J. Edwards (excerpts attached to Motion) at 8-10. This action was filed in January 2001. Docket.

The statute and the plaintiff's own testimony are dispositive. The plaintiff must be deemed to be a resident of New Hampshire under the circumstances of this action, and diversity of citizenship therefore is lacking. As a result, this court lacks jurisdiction over the subject matter of the complaint and the action must be dismissed.

Dated this 17th day of September, 2001.

David M. Cohen United States Magistrate Judge

SHARI J EDWARDS, SHARI J. SHARI J EDWARDS EDWARDS, as Conservator and [PRO SE]

Guardian for Aaron W. Brown P.O. BOX 171

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JAMES MICHALIK, ESQUIRE JONATHAN S. PIPER

defendant 775-5831

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